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Supreme Court of the United States

OCTOBER TERM, 1965

No. 1021

J. VERNON YOST, JOHN B. HOLEY, FREDDIE L. GRAVES, BENJAMIN D. GARNER, E. D. GRIGGS, PAUL K. MOON, JOHN J. HOOD, JAMES O. GILMORE, MRS. JAMES O. GILMORE, MRS. EARLOR MAE SHEETS, HENRY G. JONES, MRS. MAURICE H. JONES, and MRS. LILLIE D. SHEETS,

Petitioners

vs.

HON. EUGENE GUNBY, Ordinary of Fulton County; HON. KATHERINE MANN, Ordinary of DeKalb County; HON. ALTON W. TUCKER, Ordinary of Gwinnett County; HON. BEN W. FORTSON, JR., Secretary of State of Georgia, in his capacity as Chairman of the State Election Board; JAMES H. ALDREDGE, HAROLD F. McCART, and ARCHIE LINDSEY, as Commissioners of Fulton County, Georgia; BRINCE MANNING, TOM CALLAWAY, J. C. HAYNES, JIM ALMAND, and BILL EVANS, as Commissioners of DeKalb County; IVAN ALLEN, JR., as Mayor of the City of Atlanta, and each and all of the Members of the Board of Aldermen of the City of Atlanta,

Defendants

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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J. VERNON YOST, JOHN B. HOLEY, FREDDIE L. GRAVES, BENJAMIN D. GARNER, E. D. GRIGGS, PAUL K. MOON, JOHN J. HOOD, JAMES O. GILMORE, MRS. JAMES O. GILMORE, MRS. EARLOR MAE SHEETS, HENRY G. JONES, MRS. MAURICE H. JONES, and MRS. LILLIE D. SHEETS,

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Defendants

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

J. Vernon Yost, John B. Holey, Freddie L. Graves,

Benajmin D. Garner, E. D. Griggs, Paul K. Moon, John J. Hood, James O. Gilmore, Mrs. James O. Gilmore, Mrs. Earlor Mae Sheets, Henry G. Jones, Mrs. Maurice H. Jones, and Mrs. Lillie D. Sheets file this their petition for writ of certiorari to the Supreme Court of Georgia for the purpose of having reviewed, corrected, and reversed the decision and judgment of that Court of November 9, 1965, arbitrarily and capriciously dismissing from the bench, without a hearing or opportunity to be heard, the appeal of petitioners from an order of the Superior Court of Fulton County, Georgia of July 28, 1965, dismissing the petitioners' petition on general demurrer; and the decision and judgment of the Supreme Court of Georgia of November 29, 1965 denying petitioners' motion for rehearing and holding that the affidavits of G. Seals Aiken, Benjamin D. Garner, and George H. Keeler, attached to and made a part of said motion, constituted no part of the motion and directing and causing the Clerk of said Court "to detach the said affidavits from the motion and return them together with a copy of this order to counsel for movants."

The peremptory dismissal by the Supreme Court of Georgia of petitioners' appeal deprived them of a hearing and decision on the substantial federal questions presented by the appeal, including the alleged invalidity of the election of June 16, 1965 as to whether the City of Atlanta and Fulton County especially would participate in the Metropolitan Atlanta Rapid Transit Authority Act of 1965 and whether the Seventeenth Amendment of the Georgia Constitution and the Metropolitan Atlanta Rapid Transit Authority Act under which said election was held violated Section I of the Fourteenth

Amendment and other portions of the U. S. Constitution in the particulars specified.

The Supreme Court of Georgia is the highest court of this State in which a decision in this case could be had.

CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The decision of the Supreme Court of Georgia sought to be reviewed was first rendered arbitrarily and capriciously from the Bench on November 9, 1965 when counsel for petitioners appeared before the court en banc to argue the case pursuant to the usual formal notice from the Clerk thereof to appear for that purpose. When counsel for petitioners arose and attempted to argue their case, Mr. Chief Justice Duckworth announced that the case was being dismissed and that counsel for petitioners would not be allowed to make any argument because their enumeration of errors was not filed within fifteen days from the date of docketing the appeal. Counsel for petitioners then requested the opportunity of filing a brief on said point, which was first granted and then denied, all as set forth in petitioners' motion for rehearing. (R. 132-156)

Rule 20 of the Supreme Court of Georgia provides that "The brief of counsel for the appellant must be filed with the clerk within 15 days after the docketing of the case in this court," and Section 14 of the Georgia Appellate Practice Act of 1965 as amended (Ga. Code Sec. 6-810), Pocket Parts, provides that "The Appellant*** shall, AT THE TIME THE BRIEF IS FILED IN THE SUPREME COURT*** file with the Clerk of the Appellate Court an enumeration of the errors relied

upon, and shall likewise simultaneously file a copy of such enumeration of errors with the Clerk of the Trial Court, which shall set out separately each error relied upon." In compliance with said Rule and Act, counsel for petitioners obtained from Mr. Chief Justice Duckworth within the time allowed by said Rule an extension of ten days in which to file their brief and he accordingly filed said brief and enumeration of errors simultaneously within said extension of time, all as shown by petitioners' motion for rehearing and accompanying affidavits made a part thereof. (See Certificate of Clerk of Supreme Court of Georgia so stating).

On November 10, 1965 petitioners' counsel received through the mail a formal written decision and judgment of the Supreme Court of Georgia stating that the appeal was dismissed on November 9, 1965. (R-132).

Petitioners filed a timely motion for rehearing with supporting affidavits showing their appeal was arbitrarily and capriciously dismissed by the Supreme Court of Georgia from the Bench without a hearing or opportunity to be heard and therefore without due process of law and without equal protection of the law in violation of Section I of the Fourteenth Amendment of the U. S. Constitution. The said motion was denied as aforesaid on November 29, 1965 without passing upon said federal constitutional question raised therein. (R. 156).

The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is Section 1257 (3) of Title 28 U.S.C.A., reading in part as follows: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: *** (3) By writ of certiorari,

***Where any title, right, privilege or immunity is specially set up or claimed under the Constitution *** of * * * the United States."

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the Supreme Court of Georgia in arbitrarily and capriciously dismissing petitioners' appeal from the Bench without a hearing or opportunity to be heard deprived the petitioning citizens and taxpayers of Georgia and of the United States of their liberty and property without due process of law and without equal protection of the law, in violation of Section I of the Fourteenth Amendment of the U. S. Constitution, accorded to other persons in Georgia in like circumstances and similar situations, as contended by petitioners.

2. Whether the Supreme Court of Georgia deprived petitioners of their liberty and property without due process of law and equal protection of the law by arbitrarily and capriciously holding that the affidavits attached to, made a part of, and filed with their motion for rehearing (showing how their appeal from the Superior Court of Fulton County Georgia was arbitrarily and capriciously dismissed from the Bench without a hearing or opportunity to be heard in a case involving substantial Federal constitutional questions timely and properly raised) constituted "no proper part of the motion for a rehearing" and in directing and causing its clerk to detach the said affidavits from the motion and return them to petitioners' counsel.

3. Whether the Supreme Court of Georgia can prevent this Court from exercising its jurisdiction in granting the writ of certiorari to review and reverse the former, by directing and causing its clerk to detach and return

to petitioners' counsel the affidavits attached to, made a part of, and filed with their motion for rehearing, showing how that Court arbitrarily and capriciously dismissed their appeal from the Superior Court of Fulton County, Georgia involving Federal constitutional questions timely and properly raised, without a hearing or opportunity to be heard, in violation of Section I of the Fourteenth Amendment of the Constitution of the United States.

4. Whether the Supreme Court of Georgia deprived petitioners of their liberty and property without due process of law and without equal protection of the law, in violation of Section I of the Fourteenth Amendment of the U. S. Constitution in dismissing their appeal on the ground that it was required by the Georgia Appellate Practice Act of 1965 as amended (1965 Ga. Laws 240-44) to do so because petitioners' Enumeration of Errors was not filed within fifteen days from the date of docketing the appeal and that it had invariably so held in other cases, WHEREAS the said Act does not so require but requires that the Enumeration of Errors be filed "at the time the brief is filed in the Supreme Court" and petitioners filed their Enumeration of Errors at the time of filing their brief and within the extension of time granted by said Court for the filing of said Brief, and, furthermore, the said court in the case of Mallard vs Mallard, No. 23151, ——Ga. ——, on Oct. 19, 1965, took jurisdiction and reversed the trial court without even mentioning the fact that the case was docketed on August 20, 1965, and the Enumeration of Errors was not filed until Sept. 15, 1965, or twenty six days after the date of docketing the case, and no extension of time for

filing the brief or the Enumeration of Errors was requested or obtained.

5. Whether the Supreme Court of Georgia deprived petitioners of their liberty and property without due process of law and without equal protection of the law, in violation of Section I of the Fourteenth Amendment of the *U. S. Constitution* by arbitrarily and capriciously denying on Nov. 29, 1965 petitioners' motion for rehearing specifically alleging that they were deprived of due process of law and of equal protection of the law by said court, in violation of Section I of the Fourteenth Amendment of the U. S. Constitution, in dismissing their appeal without a hearing or opportunity to be heard and in erroneously holding that it had invariably held that the Georgia Appellate Practice Act of 1965 as amended required a dismissal of the appeal where the Enumeration of Errors was not filed within fifteen days from the date of docketing the appeal, whereas said court had taken jurisdiction and reversed the trial court in Mallard vs Mallard, No. 23151, —Ga. —, on Oct. 19, 1965 without even mentioning the fact that the case was docketed on Aug. 20, 1965 and the Enumeration of Errors was not filed until Sept. 15, 1965, or twenty six days after the date of docketing the case, and no extension of time for filing the brief or Enumeration of Errors was sought or obtained, and the said court arbitrarily and capriciously ignored said substantial Federal constitutional grounds timely and properly raised by petitioners in their said motion for rehearing.

6. Whether the Supreme Court of Georgia deprived the petitioners of their liberty and property without due process of law and without equal protection of the law by arbitrarily and capriciously holding that the affidavits

by G. Seals Aiken, Benjamin D. Garner, and George H. Keeler, attached to petitioners' motion for rehearing in that court and expressly made a part thereof by petitioners, constituted no proper part of said motion for rehearing, and in arbitrarily and capriciously directing and causing the Clerk of said court to detach said affidavits from said motion for rehearing and to return them to counsel for petitioners, although they constitute an essential part of said motion for rehearing in setting forth for the record the facts which transpired at the time petitioners' appeal was arbitrarily and capriciously dismissed from the Bench without a hearing or opportunity to be heard, as shown by said affidavits, and also whether the Supreme Court of Georgia should be directed to have said affidavits re-attached to said motion for rehearing and re-filed by the Clerk of said Court so they can be certified as a part of the record by him for transmission to this Court for consideration with this petition for certiorari.

7. Whether the petitioning citizens and taxpayers of Georgia and the United States were deprived of their liberty and property by the Superior Court of Fulton County, Georgia without due process of law and without equal protection of the law, in violation of Section I of the Fourteenth Amendment of the U. S. Constitution in the particulars specified in their petition in said trial court by the refusal of Trial Judge Moore to disqualify as required by law and by his dismissal of said petition without a trial or opportunity to present evidence in support thereof and without a trial of all questions of fact by a jury as demanded by petitioners and as required by law, and whether the Supreme Court of Georgia deprived petitioners of their liberty and proper-

ty without due process of law and without equal protection of the law, in violation of Section I of the Fourteenth Amendment of the U. S. Constitution by dismissing petitioners' appeal to that court from the Superior Court of Fulton County, Georgia without a hearing or opportunity to be heard and without even considering or passing upon any of the substantial federal constitutional grounds raised by petitioners in their petition in the trial court and their notice of appeal and enumeration of errors of the trial court and motion for rehearing in the Supreme Court of Georgia, including the allegations of petitioners that the Metropolitan Atlanta Rapid Transit Authority Act and the Seventeenth Amendment of the Constitution of Georgia under which it was enacted and the referendum election of June 16, 1965 pursuant thereto deprive petitioners of due process of law and of equal protection of the law in violation of Section I of the Fourteenth Amendment of the U. S. Constitution in the particulars specified by petitioners in their said petition, appeal, enumeration of errors, and motion for rehearing.

CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

This litigation commenced on June 23, 1965, by the filing of a petition by petitioners against the defendants attacking the legality and constitutionality of the special election on June 16, 1965 in Metropolitan Atlanta as it related to participation in the Metropolitan Atlanta Rapid Transit Authority Act of 1965 and said Act and Amendment XVII of the Constitution of Georgia under which said election was held. Petitioners alleged in said petition that the said election and the Metropolitan At-

lanta Rapid Transit Authority Act and Amendment XVII of the Constitution of Georgia under which said election was held violated Section I of the Fourteenth Amendment and other provisions of the U. S. Constitution as well as many provisions of the Georgia Constitution in the particulars specified. (R. 46, 82, 93).

Petitioners demanded a jury trial of all questions of fact presented in their verified petition and moved to disqualify Presiding Judge Moore of the Superior Court of Fulton County on the ground that the Georgia Election Code 1704 (b) expressly provides that in such an election contest case "the Superior Court having jurisdiction shall be presided over by the Judge of the Superior Court who resides nearest the courthouse in which the contest is filed but who resides in a judicial circuit wholly outside of the congressional or senatorial district or other area involved in the contest," etc. Presiding Judge Moore, nevertheless, denied petitioners' motion to disqualify him and also refused to grant petitioners a jury trial as to the facts as demanded by them and required by law, and petitioners alleged in their petition that Presiding Judge Moore by so doing deprived them of due process of law and of equal protection of the law granted to other persons in Georgia in like circumstances and similar situations, in violation of Section I of the Fourteenth Amendment of the U. S. Constitution. (R. 37-8, 46, 82, 92, 93).

Petitioners alleged in their petition in the trial court that the said Amendment XVII of the Constitution of Georgia deprives them of their liberty and property without due process of law and without equal protection of the law in violation of Section I of the Fourteenth Amendment of the U. S. Constitution in that it au-

thorizes the General Assembly of Georgia to grant to the City of Atlanta and counties of the Metropolitan Atlanta area participating in said Metropolitan Atlanta Rapid Transit Authority Act unlimited power to tax petitioners to acquire and maintain a rapid transit system, even to the extent of levying taxes for the full value of petitioners' property, thereby confiscating the same.

Petitioners alleged in their petition in the trial court that the said Amendment XVII of the Constitution of Georgia deprives them of due process of law and of equal protection of the law in violation of Section I of the Fourteenth Amendment of the U. S. Constitution in that it grants to the Metropolitan Atlanta Rapid Transit Authority and the persons acting under it unlimited legislative, executive, and judicial power in violation of Article I, Section I, Paragraph XXIII of the Georgia Constitution, and Article IV, Section IV of the Constitution of the United States guaranteeing to every State in the Union a republican form of government, and Amendment XIII of the U. S. Constitution providing that "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Petitioners set forth in their petition in the trial court many other particulars in which the Seventeenth Amendment of the Georgia Constitution, the Metropolitan Atlanta Rapid Transit Authority Act enacted thereunder, and the election of June 16, 1965 held thereunder violated both the Constitution of the United States and the Constitution of Georgia.

In petitioners' enumeration of errors on appeal to the Supreme Court of Georgia, they assigned error on all

the rulings of the Superior Court of Fulton County, Georgia adverse to the contentions of petitioners in their petition and motion to disqualify the trial judge, as being contrary to law and the Constitutions of the United States and of Georgia in all the particulars and for all the reasons set forth in their petition and record before the Court, and especially Section I of the Fourteenth Amendment of the U. S. Constitution, in that petitioners were thereby deprived of applicable and controlling provisions of the Georgia Constitution and the law granted to other persons in like circumstances and similar situations, and in said manner were deprived of their liberty and property without due process of law and equal protection of the law, in violation of Section I of the Fourteenth Amendment of the U. S. Constitution.

All of the federal constitutional questions presented by petitioners were timely and properly raised and urged and insisted upon by petitioners' counsel from the very beginning but were ignored by both the Superior Court of Fulton County, Georgia and the Supreme Court of Georgia.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

The federal questions involved in this petition for certiorari are substantial and of gravity and importance in that the decision of the Supreme Court of Georgia of November 9, 1965 in peremptorily dismissing petitioners' appeal from the Superior Court of Fulton County, Georgia, without a hearing or opportunity to be heard, is ARBITRARY AND CAPRICIOUS and subjects petitioners to the deprivation of their liberty and prop-

erty in the arbitrary discretion of the Metropolitan Atlanta Rapid Transit Authority and persons acting under it, without due process of law and without equal protection of the law, in violation of Section I of the Fourteenth Amendment of the U. S. Constitution in the particulars and manner set forth in petitioners' verified petition, enumeration of errors on appeal to the Supreme Court of Georgia, and the record before this Court.

In the case of *Tolbert vs Long*, Ordinary, et al, 134 Ga. 292, 67 S.E. 826, the Supreme Court of Georgia held that equity will entertain jurisdiction of a petition by a citizen and taxpayer to enjoin against the declaration of the result of an election held under a special act establishing a board of commissioners for a named county, defining their duties, etc., which act provides that it shall not become operative in the county unless ratified by a vote of the people, WHERE IT IS CHARGED THAT THE WHOLE ACT IS UNCONSTITUTIONAL, or infected with other illegality, frustrating the legislative plan of ratification. THIS IS EXACTLY WHAT PETITIONERS (citizens and taxpayers of Metropolitan Atlanta and of Georgia and of the United States) did in the case at bar. They filed a verified petition alleging fraud, irregularities, and violation of mandatory provisions of the law and applicable provisions of the Georgia Constitution by the officials in charge of the referendum election of June 16, 1965 and alleged the particulars in which said election and the Seventeenth Amendment of the Constitution of Georgia and the Metropolitan Atlanta Rapid Transit Authority Act under which said election was held deprived them of their liberty and property without due process of law and equal protection of the law, in violation of Section

I of the Fourteenth Amendment of the U. S. Constitution. (R. 1, 46, 82, 93). They secured a temporary injunction to prevent the declaration of the results of said referendum election and to prevent any action or the assumption of any office of any kind or the expenditure of any public funds for the purpose implicit in the referendum election. (*Appendix*) This injunction was arbitrarily and capriciously dissolved by the disqualified trial judge without any evidence or the opportunity to present any evidence and without a jury trial of the questions of fact presented by the verified petition as required by the jury trial demand of petitioners and the law applicable thereto. (R. 100).

In the case of *Marbut et al vs Hollingshead et al,* 172 Ga. 531, 158 S.E. 28, the Supreme Court of Georgia held that a court of equity will enjoin an election where the constitutional rights of citizens and taxpayers are sought to be invaded by an attempt to make an unconstitutional or inapplicable law operative through the means of an election and that the principle upon which this decision is based is that such an election would bring about confusion, subject citizens and taxpayers to damages, and cause a multiplicity of suits.

Petitioners vigorously urged all of said federal constitutional grounds before the Superior Court of Fulton County, but it ignored them and dismissed petitioners' verified petition upon general demurrer.

Petitioners then appealed to the Supreme Court of Georgia, which had appellate jurisdiction of said case under the Georgia Constitution, and urged all of said federal constitutional questions in their notice of appeal and enumeration of errors and briefs. (R. 1) That Court also ignored said federal constitutional grounds

by dismissing from the bench without a hearing and without an opportunity to be heard, the appeal of petitioners, thereby depriving petitioners of due process of law and equal protection of the law, in violation of Section I of the Fourteenth Amendment of the U. S. Constitution.

Petitioners filed a timely motion for rehearing with accompanying affidavits, which were made a part thereof, showing that petitioners' said appeal was arbitrarily and capriciously dismissed without a hearing and without an opportunity to be heard and contrary to its decisions in other cases for other persons in like circumstances and similar situations, and that petitioners were thereby deprived of due process of law and equal protection of the law in violation of Section I of the Fourteenth Amendment of the U. S. Constitution. The Supreme Court of Georgia denied said motion for rehearing on Nov. 29, 1965 without passing upon said federal constitutional grounds raised in said Court or upon the federal constitutional grounds raised in the Superior Court of Fulton County, Georgia, and held that the affidavits attached to petitioners' said motion for rehearing and made a part thereof and filed with said motion constituted "no proper part of the motion for a rehearing" and directed and caused the Clerk of the Supreme Court of Georgia to detach the said affidavits from the motion and return them together with a copy of said order of Nov. 29, 1965 to counsel for petitioners. (R. 156).

In the written decision of the Supreme Court of Georgia confirming its oral dismissal of petitioners' appeal without a hearing or opportunity to be heard, it states: "In this case the appellants filed their enumeration of errors nineteen days after the appeal was docketed in this

court. Hence, the case is controlled by *Stanford vs Evans, Reed and Williams,* 221 Ga.____(—SE 2nd—), Case No. 23160, which held that an enumeration of errors filed more than fifteen days after the appeal was docketed in this court was not timely." The said statement of the Supreme Court of Georgia IS INCORRECT AND SAID CASE CITED BY IT DOES NOT SUPPORT ITS DECISION IN THIS CASE BUT DEPRIVES PETITIONERS OF THEIR LIBERTY AND PROPERTY WTHOUT DUE PROCESS OF LAW AND WITHOUT EQUAL PROTECTION OF THE LAW, IN VIOLATION OF SECTION I OF THE FOURTEENTH AMENDMENT of the U. S. Constitution for many reasons, some of which are as follows: (1) That case was dismissed because the notice of appeal was not filed within the time required under the 1965 Georgia Laws, pages 18, 29 as amended by 1965 Georgia Laws pages 240, 241 (Ga. Code Annotated Section 6-809). (2) On motion for rehearing in that case that court stated: "For the reasons therein stated we adhere to our original judgment. However, for another insurmountable reason this case must be dismissed. Upon further examination of the record, we find that the enumeration of errors was filed seventeen days after the case was docketed in this court. Under the view we take of Sections 13 and 14 of the Appellate Procedure Act of 1965 (Ga. L. 1965, pp. 18, 29, as amended Ga. L. 1965, pp. 240, 243; Code Ann. Sections 6-809 and 6-810) they require the enumeration of errors to be filed within the time prescribed by this court for the appellant to file his brief. Rule 20 of the Rules of the Supreme Court of the State of Georgia specifies that the appellants' brief must be filed with the clerk within 15 days after the docketing of the case in

this court. Hence, the enumeration of errors in this case was not timely and, for this further reason, the appeal is dismissed." (3) No extension of time was sought or granted for the filing of a brief or enumeration of errors in that case. (4) The court stated as aforesaid: "Under the view we take of Sections 13 and 14 of the Appellate Procedure Act of 1965 (Ga. L. 1965, pp. 18, 29, as amended Ga. L. 1965, pp. 240, 243; Code Ann. Sections 6-809 and 6-810) they require the enumeration of errors to be filed within the time prescribed BY THIS COURT FOR THE APPELLANT TO FILE HIS BRIEF." (Capitals added). (5) Appellants' enumeration of errors in the case at bar WAS "filed within the time prescribed BY THIS COURT FOR THE APPELLANT TO FILE HIS BRIEF." (6) Section 14 of the Appellate Practice Act of 1965 (Ga. Laws 1965, pages 29-30) prior to amendment, provided that, "The appellant *** shall file as a part of their brief in the appellate court, at such time as may be prescribed by its rules, an enumeration of the errors relied upon ***." This was changed by an amendment of said Act in Ga. Laws 1965, pages 243-4, to provide that, "The appellant *** shall, AT THE TIME THE BRIEF IS FILED in the Supreme Court or the Court of Appeals, as the case may be, file with the clerk of the appellate court, an enumeration of errors relied upon, and shall likewise simultaneously file a copy of such enumeration of errors with the clerk of the trial court **." (Capitals added) The said statute does not provide, either before or after the amendment thereof, that the enumeration of errors must be filed within fifteen days after the docketing of the case as held by this court in *Stanford vs Evans, Reed and Williams,* supra, but said Appellate Practice Act of 1965 as amended does

require that the appellant shall file an enumeration of errors AT THE TIME THE BRIEF IS FILED in the Supreme Court. (7) The decision of this court in the case of *Stanford vs Evans, Reed and Williams,* supra, is incorrect in holding that Sections 13 and 14 of the Appellate Procedure (Practice) Act of 1965 as amended "require the enumeration of errors to be filed within the time prescribed by this court for the appellant to file his brief." The said act as amended requires instead that, "The appellant *** shall, AT THE TIME THE BRIEF IS FILED in the Supreme Court or the Court of Appeals, as the case may be, file with the clerk of the appellate court an enumeration of the errors relied upon," etc. (Capitals added). (8) This court has the inherent power to change its rules and to grant extensions of time for the filing of briefs, enumeration of errors relied upon, and other documents. It has the power to do so under the express provisions of its own Rule 8 providing that, "Once a case is filed in this court, it will in the exercise of the judicial power conferred upon it by the constitution (Code Ann. Sections 2-3704, 2-3707; Const. 1945) render any judgment it thinks proper, including judgments of dismissal, notwithstanding the provisions of the Appellate Practice Act of 1965," and the applicable provisions of the Georgia Constitution cited by it in said rule and especially Article VI, Section 2, paragraph 7 (Ga. Code Sec. 2-3707) providing that, "The Supreme Court shall have power to hear and determine cases when sitting in a body, UNDER SUCH REGULATIONS AS MAY BE PRESCRIBED BY IT." (Capitals added). (9) Rule 35 of the Supreme Court of Georgia expressly provides that, "Notice of a motion to dismiss and of the grounds thereof should be given in writing to

counsel for the appellant five days before the case is called for argument, service thereof to be made and shown as required in the service of briefs***." No such motion was made by appellees and no notice of a motion to dismiss was ever given orally or in writing to appellants or their counsel, and no motion to dismiss appellants' appeal was made by appellees or their counsel when this case was called for argument by the Supreme Court of Georgia on November 9, 1965. When counsel for appellants sought to argue the case when called for argument on Nov. 9, 1965 by the court, the Chief Justice simply stated the case would be dismissed on the ground that "the enumeration of errors was not filed within fifteen days from the date of docketing the case as required by the statute." The statute DID NOT AND DOES NOT SO REQUIRE BUT ONLY REQUIRES THAT THE ENUMERATION OF ERRORS BE FILED AT THE TIME THE BRIEF IS FILED. (10) The Supreme Court of Georgia under its Rule 8 and the provisions of the Georgia Constitution therein relied upon and under its inherent power had ample power and jurisdiction to grant an extension of time in which to file both briefs and enumerations of errors, and by granting an extension of time in this case in which to file a brief, without excepting the enumeration of errors, necessarily granted the same extension of time in which to file the enumeration of errors because Section 14 of the Appellate Practice Act of 1965 as amended expressly provides that the appellant shall file the enumeration of errors AT THE TIME THE BRIEF IS FILED IN THE SUPREME COURT. As shown by the affidavit of counsel for petitioners attached to their motion for rehearing in the Supreme Court of Georgia, the Chief

Justice of that Court did not except the enumeration of errors when he granted the extension of ten days to petitioners in which to file a brief, or make any statement about the enumeration of errors. (11) The statement of the Supreme Court of Georgia on Nov. 9, 1965 that the Appellate Practice Act of 1965 as amended required the enumeration of errors to be filed within fifteen days from the date of the docketing of the case and that it is bound thereby is incorrect because the statute does not so require but, if it did, that court has ample power and jurisdiction under its own Rule 8 and the provisions of the Georgia Constitution therein relied upon, to grant an extension of time for the filing of both briefs and enumerations of error. (12) Furthermore, Section 6 of the Appellate Practice Act of 1965 provides that, "any Justice or Judge of the Appellate Court to which the appeal is to be taken may, in his discretion, and without motion or notice to the other, grant extension of time for the filing of (a) notice of appeal, (b) notice of cross appeal, (c) transcript of the evidence and proceedings on appeal or in any other instance where filing of the transcript is required or permitted by law, (d) designation of record referred to under Section 11 hereof; and (e) ANY OTHER SIMILAR MOTION, PROCEEDING OR PAPER FOR WHICH A FILING TIME IS PRESCRIBED**." (Capitals added). (13) The declared purpose of the Appellate Practice Act of 1965 was to "comprehensively and exhaustively revise, supersede, and modernize appellate and other post-trial procedure in civil and criminal cases" to prevent the dismissal of cases on mere technicalities, and to require decisions of cases on their merits. (14) The decision of said court in dismissing

petitioners' appeal on the grounds stated and without a hearing or opportunity to be heard, violates the letter and spirit of said Act and deprives petitioners of their liberty and property without due process of law and equal protection of the law granted to others in like circumstances and similarly situated in the particulars specified in their verified petition in the trial court and appeal to the Supreme Court of Georgia and motion for rehearing therein, in violation of Section I of the Fourteenth Amendment of the U. S. Constitution, providing that no State shall deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws as contended by petitioners in the Supreme Court of Georgia. (15) The statement of the Supreme Court of Georgia on Nov. 9th, as shown by petitioners' motion for rehearing and affidavits attached thereto filed in said court, that it had invariably held that an appeal must be dismissed where the enumeration of errors is not filed within fifteen days from the date of the docketing of the case, is erroneous in that the said court did not disclaim jurisdiction or dismiss the appeal in the case of *Mallard vs Mallard,* No. 23151, decided on Oct. 19, 1965, in which the enumeration of errors was not filed within fifteen days from the date of docketing the case, as shown by the affidavit of counsel for petitioners attached to their motion for rehearing, but granted the appeal and reversed the trial court without even mentioning the fact that the enumeration of errors had not been filed within fifteen days from the date of docketing the case. The judgment of said court of Nov. 9, 1965 therefore in dismissing petitioners' appeal upon the ground that the enumeration of errors was not filed

within fifteen days from the date of docketing the case deprives petitioners of their liberty and property without due process of law and without equal protection of the law in violation of Section I of the Fourteenth Amendment of the U. S. Constitution in that petitioners were deprived of due process of law and equal protection of the law granted to the appellant in the case of *Mallard vs Mallard,* supra, under like circumstances and similarly situated except that no extension of time for filing the brief was requested or granted in the Mallard case. (16) As shown by the affidavit of counsel for petitioners attached to their motion for rehearing in the Supreme Court of Georgia, no extension of time for filing of a brief was obtained from said court in any of the cases dismissed by it for failure to file the enumeration of errors within fifteen days from the date of docketing the cases except the case of these petitioners. (17) Ga. Code Section 6-1606 provides that, "No decision shall be delivered ore tenus but the same shall be announced by a written synopsis of the points decided, which shall be delivered during the term in which the decision was made." (18) Section 14 of the Appellate Practice Act of 1965 as amended provides that the cross appellant shall, at the time the brief is filed in the Supreme Court, file with the Clerk of said court an enumeration of the errors relied upon and shall likewise simultaneously file a copy of such enumeration of errors with the Clerk of the trial court, which shall set out separately each error relied upon. No enumeration of errors was filed by the defendants in this case and no motion to dismiss petitioners' appeal was made by defendants. The petitioners were, therefore, deprived of their liberty and property without due process of law and without equal protection

of the law granted to others in like circumstances and similar situations as specified, in violation of Section I of the Fourteenth Amendment of the U. S. Constitution. (19) Petitioners have been deprived of their liberty and property without due process of law and without equal protection of the law by the Supreme Court of Georgia in violation of Section I of the Fourteenth Amendment of the U. S. Constitution by its failure and refusal to decide the federal constitutional questions raised in petitioners' petition as amended and in their appeal to and motion for rehearing in said court. (20) The action of the Supreme Court of Georgia in refusing to consider the amount of the proposed indebtedness of MORE THAN ONE BILLION DOLLARS in initial construction cost of the Proposed Rapid Transit Authority Project (to the payment of which petitioners will be forced to contribute in taxes without any limitation except the arbitrary discretion of the Metropolitan Atlanta Rapid Transit Authority and persons acting under it), as shown by the affidavits attached to petitioners' motion for rehearing in said court, deprives petitioners as citizens and taxpayers of Metropolitan Atlanta and of Georgia and of the United States of their liberty and property without due process of law and without equal protection of the law, in violation of Section I of the Fourteenth Amendment of the U. S. Constitution by depriving them of the application and effect of Article VII, Section VII, Paragraph I of the Georgia Constitution, Ga. Code Sec. 87-601, and the decision of that court in *Renfroe vs City of Atlanta,* 140 Ga. 81, 78 S.E. 449, granted to other persons in like circumstances and similar situations.

As held by the U. S. Supreme Court in *State of Missouri ex rel Gaines vs Canada et al,* 305 U.S. 357 (7), 59

S. Ct. 232, THE EQUAL PROTECTION OF LAWS IS A PLEDGE OF THE PROTECTION OF EQUAL LAWS. As also stated by said court in *Hill vs State of Texas,* 316 U.S. 400, 62 S. Ct. 1159: "EQUAL PROTECTION OF THE LAW IS SOMETHING MORE THAN AN ABSTRACT RIGHT. IT IS A COMMAND WHICH THE STATE MUST RESPECT – THE BENEFIT OF WHICH EVERY PERSON MAY DEMAND." (Capitals added).

In the case of *Norris vs Ala.,* 294 U.S. 587, 55 S. Ct. 579, the U. S. Supreme Court held, "Where a federal right is specially claimed in a State Court (which was timely done in the case at bar), this court must inquire whether the right was denied, not merely in express terms, but also in substance and effect, and, if necessary, evidence must be examined."

In the case of *Malinski et al vs People of State of New York,* 324 U.S. 401, 65 S. Ct. 781, the U. S. Supreme Court held: "Judicial review of the guaranty of due process imposes on the Federal Supreme Court an exercise of judgment upon the whole course of proceedings to ascertain whether they offend those canons of decency and fairness which express the motions of justice of English-speaking people."

Section I of the Fourteenth Amendment of the U. S. Constitution expressly provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws."

In construing the Fourteenth Amendment of the U. S. Constitution, the U. S. Supreme Court held in *Chambers et al vs State of Florida,* 309 U.S. 227, 60 S.

Ct. 472: "*** ALL PEOPLE MUST STAND ON AN EQUALITY BEFORE THE BAR OF JUSTICE IN EVERY AMERICAN COURT. *** UNDER OUR CONSTITUTIONAL SYSTEM, COURTS STAND AGAINST ANY WINDS THAT BLOW AS HAVENS OF REFUGE FOR THOSE WHO MIGHT OTHERWISE SUFFER BECAUSE THEY ARE HELPLESS, WEAK, OUTNUMBERED, OR BECAUSE THEY ARE NON-CONFORMING VICTIMS OF PREJUDICE AND PUBLIC EXCITEMENT. *** NO HIGHER DUTY, NO MORE SOLEMN RESPONSIBILITY, RESTS UPON THIS COURT, THAN THAT OF TRANSLATING INTO LIVING LAW AND MAINTAINING THIS CONSTITUTIONAL SHIELD DELIBERATELY PLANNED AND INSCRIBED FOR THE BENEFIT OF EVERY HUMAN BEING SUBJECT TO OUR CONSTITUTION — OF WHATEVER RACE, CREED OR PERSUASION." (Capitals added).

In the case of *Hovey vs Elliott*, 167 U.S. 409, 17 S. Ct. 841, the U. S. Supreme Court held in part:

> "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action, and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends. * * * A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial deter-

mination of his rights, and is not entitled to respect in any other tribunal. * * * IT IS DIFFICULT TO SPEAK OF A DECREE THUS RENDERED WITH MODERATION. IT WAS, IN FACT, A MERE ARBITRARY EDICT, CLOTHED IN THE FORM OF A JUDICIAL SENTENCE. THIS LANGUAGE BUT EXPRESSES THE MOST ELEMENTARY CONCEPTION OF THE JUDICIAL FUNCTION * * *." (Capitals added).

In the case of *Yick Wo vs Hopkins,* 118 U.S. 356, 6 S. Ct. 1071-3, the U. S. Supreme Court held: "But the fundamental right to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' FOR THE VERY IDEA THAT ONE MAN MAY BE COMPELLED TO HOLD HIS LIFE, OR THE MEANS OF LIVING, OR ANY MATERIAL RIGHT ESSENTIAL TO THE ENJOYMENT OF LIFE, AT THE MERE WILL OF ANOTHER, SEEMS TO BE INTOLERABLE IN ANY COUNTRY WHERE FREEDOM PREVAILS, AS BEING THE ESSENCE OF SLAVERY ITSELF. * * * Though the law itself be fair on its face, and impartial in appliance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still

within the prohibition of the constitution." (Capitals added).

In the case of *Moody and Wife vs Davis,* 10 Ga. at pages 410, 411, the Supreme Court of Georgia held in part as follows: "* * * it is unquestionably the right and duty of counsel to bring to the view of the court, for its determination, any point of law, which properly springs out of the cause, and which they may think important for the interests of their clients. They are in court for that purpose; they are bound to observe closely, to labor diligently, and to know thoroughly, in order that they may secure the determination of the rights of their client, according to law. The beautiful theory of a trial is this: both sides are represented by counsel, that their rights may be settled, not by art or chicane, or the tricks of the orator, but according to the law. It is, therefore, the duty of counsel to present to the court the points which he conceives are in favor of his client; AND IT IS HIS RIGHT TO BE HEARD IN ARGUMENT TO SUSTAIN THEM; and when presented, IT IS THE DUTY OF THE COURT TO PASS UPON THEM if they grow out of the case. * * * As officers of the court, the duties of counsel are not in conflict with those which devolve upon him as the representative of a party. They are the friends of the court, enlisted with him in the sublime work of discovering truth, and dealing out justice between man and man. * * * Whilst judgment belongs alone to the Judge—ENLIGHTENMENT IS THE PROVINCE OF THE LAWYER, and I apprehend that no Judge can be found so presumptuously vain, or so flagrantly unjust, as not to recognize, and that too with grateful emotions, the aid which he derives, in the discharge of duties more solemn than belong to any

other functionary, from an able bar. * * * It is the duty of the Judge to enforce the laws of the state, made in accordance with the State and Federal Constitutions—the whole law, as it applies, in his judgment, to the cases which come before him. He has no right and no power to withhold the application of one single principle of law, to a single case over which he has jurisdiction; he has no dispensation justifying or excusing an omission to apply the law. * * *" (Capitals added).

Petitioners alleged in their petition in the trial court that they desired to contest the result of the special election of June 16, 1965 in Metropolitan Atlanta as it related to the referendum variously worded in the various areas affected thereby but which directly related to the question of participation in the Metropolitan Atlanta Rapid Transit Authority Act of 1965 on the grounds that certain irregularities were committed by the election officials sufficient to change or place in doubt the result of the election, consisting of illegal votes received and legal votes rejected at the polls, and setting forth the particulars in which they claimed said irregularities were practiced. They alleged that the referendum of June 16, 1965, insofar as the City of Atlanta and County of Fulton were concerned, was held in violation of Article VII, Section VII, Paragraph I of the Constitution of Georgia prohibiting "special registration" for the purpose of incurring new debt; that any vote "to participate" or to "participate further" in the authority aforesaid was, in fact, a vote to incur debt and that special voter registrations were effected for the purpose of voting in said referendum within the City of Atlanta and Fulton County and that the said referendum was, therefore, void and illegal.

Petitioners alleged that the Legislature of Georgia made and changed election precincts in violation of Article III, Section VII, Paragraph XVII of the Georgia Constitution, causing large numbers of voters sufficient to change the result of the election of June 16, 1965 in the City of Atlanta and Fulton County to be deprived of their right to vote.

Petitioners alleged in effect and in substance in their petition in the Superior Court of Fulton County, Georgia, that the referendum election of June 16, 1965 held in Metropolitan Atlanta and especially in the City of Atlanta and Fulton County, Georgia, was void because the officials in charge of said election violated many specified mandatory provisions of law governing said election which would have changed the result and which were applied to other such elections in like circumstances and similar situations, and that the petitioners were thereby deprived of their liberty and property without due process of law and equal protection of the law, in violation of Section I of the Fourteenth Amendment of the U. S. Constitution in the particulars specified in said petition. (R. 46, 82, 93).

Petitioners alleged in effect and in substance that the Seventeenth Amendment of the Constitution of Georgia, under which the Metropolitan Atlanta Rapid Transit Authority Act was enacted and the referendum election of June 16, 1965 was held, is void and deprives them of their liberty and property without due process of law and equal protection of the law in violation of Section I of the Fourteenth Amendment of the U. S. Constitution in that it was not published in the manner required by Article XIII, Sec. I of the Constitution of Georgia applied to other amendments to said constitution, and em-

powers the General Assembly of Georgia to exempt the Metropolitan Atlanta Rapid Transit Authority and its property, acts, activities, income and obligations and interest thereon from any tax obligations and from regulation by any agency or commission of Georgia; to levy taxes without limit, even to the extent of confiscation of the property of petitioners; and to exempt said Authority from any existing provision of or amendment to the Constitution of Georgia, or any general or special law heretofore enacted, and in that it authorizes the General Assembly to exercise the authority granted to it in said Amendment XVII by "general, special or local laws without regard to uniformity" in violation of all applicable and controlling provisions of the Constitution of Georgia applied to other persons and corporations in like circumstances and similar situations, and especially Article I, Section I, Paragraphs I, II, III, IV, XVII, XXI, XXIII, XXV, Article V, Section I, Paragraph I, and Article VI, Section I, Paragraph I, Article VII, Section I, Paragraphs I, II, III; Section II, Paragraph I; and Section VII, Paragraph I of the Constitution of Georgia. (R. 4, 46, 82, 93).

Petitioners alleged in effect and in substance in their petition in the Superior Court of Fulton County, Georgia, that the Metropolitan Atlanta Rapid Transit Authority Act of 1965 deprives them of their liberty and property without due process of law and equal protection of the law in violation of Section I of the Fourteenth Amendment of the U. S. Constitution in that it authorizes said Authority to lease the rapid transit system to private parties and to exempt the property so leased, both real and personal, and the acts, activities and income of said private parties while operating said rapid transit

system from any tax or tax obligation, although no such authority to lease to private parties or to exempt them from taxation is contained in Amendment XVII of the Constitution of Georgia under which said Act was enacted or elsewhere in said Constitution, and Article III, Section VII, Paragraph XVII of said Constitution provides that "The General Assembly shall have no power to grant corporate powers and privileges to private companies;" and in that it authorizes the Authority to borrow money as may be necessary for the purposes of the Authority and to issue negotiable revenue bonds of the Authority for the purpose of paying all or a part of the cost of a rapid transit project or projects, the estimated cost of the construction of said initial transit project being over ONE BILLION DOLLARS; in that it exempts the Authority from any regulation by the Public Service Commission of Georgia, except that when any proposed action of the Authority, or any local government on behalf of the Authority, may place a public utility, railroad or public service corporation in violation of the requirements of the Commission, or create the need for collaboration with respect to compliance with the requirements of the Commission, the Authority shall obtain the Commission's cooperation and approval of the proposed action; and in that the said Act deprives petitioners of the benefit and protection of all applicable and controlling provisions of the Constitution of Georgia granted and applied to other persons and corporations in like circumstances and similar situations, and especially Article I, Section I, Paragraphs I, II, III, IV, XVII, XXI, XXIII, XXV; Article V, Section I, Paragraph I; Article VI, Section I, Paragraph I, and Article VII, Section I, Paragraphs I, II, III; Section II, Par. I; Section

VII, Par. I of the Constitution of Georgia. (R. 4, 46, 82, 93).

Petitioners alleged in their said petition in the Superior Court that the said Seventeenth Amendment of the Georgia Constitution, the Metropolitan Atlanta Rapid Transit Authority Act enacted thereunder, and the referendum election of June 16, 1965 held in Metropolitan Atlanta as defined in said Act deprived petitioners of the effect of all the provisions of the Georgia Constitution and the law applicable to such a referendum election and which were applied to other such elections in like circumstances and similar situations and thereby deprived petitioners of due process of law and equal protection of the law in violation of Section I of the Fourteenth Amendment of the U. S. Constitution. (R. 4, 46, 82, 93).

Petitioners vigorously urged all of said federal constitutional grounds before the Superior Court of Fulton County but it ignored them and dismissed petitioners' petition upon general demurrer as aforesaid. (R. 113).

Petitioners then appealed to the Supreme Court of Georgia, which had appellate jurisdiction of said case under the Georgia Constitution, and urged all of said federal constitutional questions in their Notice of Appeal and enumeration of errors. (R. 1). That court also ignored said federal constitutional grounds by dismissing from the Bench without a hearing and without an opportunity to be heard the appeal of petitioners, thereby depriving petitioners of due process of law and equal protection of the law, in violation of Section I of the Fourteenth Amendment of the U. S. Constitution. (R. 132-3). Petitioners filed a timely motion for rehearing with accompanying affidavits, which were made a part thereof,

showing that petitioners' said appeal was arbitrarily and capriciously dismissed without a hearing and without an opportunity to be heard and contrary to its decisions in other cases in like circumstances and similar situations, and that they were thereby deprived of due process of law and equal protection of the law in violation of Section I of the Fourteenth Amendment of the U. S. Constitution. The Supreme Court of Georgia denied said motion for rehearing on Nov. 29, 1965, without passing upon said federal constitutional grounds raised in said court or upon the federal constitutional grounds raised in the Superior Court of Fulton County, Georgia, and held that the affidavits attached to petitioners' said motion for rehearing and made a part thereof and filed with said motion constituted "no proper part of the motion for a rehearing" and directed and caused the Clerk of the Supreme Court of Georgia to detach the said affidavits from the motion and return them together with a copy of said order of November 29, 1965, to counsel for petitioners. (R. 156).

In the case of *Barrentine et al vs Griner et al and vice versa,* 205 Ga. 830, 55 S.E. 2nd 536, the Supreme Court of Georgia held: "Where mandatory provisions affecting validity of election are violated, equity court has authority to declare election void."

In the body of the decision in the Barrentine case the Supreme Court of Georgia held: "To hold that the action of an official in declaring the result of an election is conclusive and cannot be questioned in a court of equity, even where the official is clothed with no authority to hold the election because of a noncompliance with mandatory prerequisites, WOULD LEAD TO ABSURD RESULTS. For instance, in a special election on the

question of legalizing the sale of liquor, an Ordinary could, in disregard of all requirements, immediately, on his own initiative, call and hold a pretended election and announce that the county was 'wet' or 'dry'. Would the courts, in such a case, be powerless to act, and would they of necessity be compelled to announce to the public that the action of the Ordinary was conclusive, and the courts were without authority to declare the election void? WE THINK NOT." (Capitals added).

In *Whittle et al vs. Whitley, et al,* 202 Ga. 633, 44 S.E. 2nd 241, the Supreme Court of Georgia held that the statutory requirement of notice of call of special election on question of legalizing and taxing liquor is MANDATORY AND FAILURE TO COMPLY THEREWITH VITIATES THE ELECTION.

The verified petition of petitioners in this case shows that the officials in charge of the election of June 16, 1965 involved in the case at bar violated mandatory provisions of law affecting said election which had been applied to others in like circumstances and similar situations, thereby depriving petitioners of due process of law and equal protection of the law in violation of Section I of the Fourteenth Amendment of the U. S. Constitution.

In the case of *Latham et al vs. Fowler et al and vice versa,* 192 Ga. 686, 16 S.E. 2nd 591, the Supreme Court of Georgia held: "Where an equity court has acquired equitable jurisdiction, it will grant complete relief with respect to all matters to which the parties may be entitled under the pleadings and proof, even though such relief may include legal rights and remedies."

In the case of *Hughes et al vs. Griner, Ordinary,* 208 Ga. 47, 65 S.E. 2nd 24, the Supreme Court of Georgia,

speaking through Mr. Chief Justice Duckworth, held in part: "Failure to comply with mandatory prerequisites to the holding of a special election, such as filing a petition to call the election as provided by law or advertising the election as required by law, renders the election void and equity will take jurisdiction and so decree."

In the case of *Cox et al vs. Williams et al,* 216 Ga. 535, 117 S.E. 2nd 899, a proceeding was brought to have a referendum election declared void. The Superior Court of Clayton County, Georgia declared the election void, and the Supreme Court of Georgia held that the election was void because there were numerous violations of the election laws.

In the case of *King et al vs. County Board of Education of Richmond County et al,* 156 S.E. 710, 42 Ga. App. 634, the Court of Appeals of Georgia held in part: "It is the general rule that when the result of an election in any precinct has been shown to be so tainted with fraud that the truth cannot be deducible therefrom, the entire poll should be rejected. McCrary on Elections, page 569. * * * It is a further well recognized rule that a fraud committed by the officers holding an election, or with their knowledge and connivance, stands upon a different footing from fraud committed by other persons, and that in such former case a willful and deliberate fraud upon the ballot box, perpetrated by the officers of the election, even though not sufficient to affect the result, may destroy the integrity of the returns made by the managers, so as to deprive them of their standing as prima facie proof of the result of the election, and so as to require additional evidence to establish the result. McCrary on Elections, pages 574, 575.**"

In the case of *Lawrence et al vs. State Commission of Miss.*, 286 U.S. 276, 52 S. Ct. 556, this Court held that if the state constitution exacted a uniform application of a tax on the appellant and his competitors, his constitutional rights were denied as well by the refusal of the state court to decide the question as by an erroneous decision of it.

In the case of *Craig vs. Harney,* 331 U.S. 367, 67 S. Ct. 1249, this court held, "Where it is asserted that a person has been deprived by a state court of a fundamental right secured by federal constitution, an independent examination of the facts by the Supreme Court may be made."

In the case of *Brooklyn Savings Bank vs. O'Neil,* 65 S. Ct. 895, 324 U.S. 697, this court held, "Where state courts fail to pass on evidence or make findings of fact because under their respective views the facts referred to are immaterial, the Supreme Court is not relieved from duty of examining evidence for purpose of determining what facts reasonably might be and presumably would be found therefrom by the state courts."

This Court has uniformly held that the fundamental requisite of due process of law is the opportunity to be heard. *Mullane vs. Central Hanover Bank and Trust Co. et al,* 339 U.S. 306, 70 S. Ct. 652; *Gonzales vs. U.S.,* 348 U.S. 407, 85 S. Ct. 409, and *In Re Oliver,* 333 U.S. 257, 68 S. Ct. 499.

The following criticism of decisions of this Court by Mr. Chief Justice Duckworth in *Sims vs. State,* 144 S.E. 2nd 103, ____ Ga. ____, is applicable to the arbitrary and capricious decision of the Supreme Court of Georgia in this case in dismissing petitioners' appeal without a hearing or opportunity to be heard, thereby depriving

petitioners of due process of law and equal protection of the law in violation of Section I of the Fourteenth Amendment of the U. S. Constitution as well as Article I, Section I, Paragraphs II and III of the Georgia Constitution in the particulars shown by this petition:

> "We want to do justice and protect the accused in all his rights and we know Georgia law concerning confessions does this, but we simply are finding it frustrating and exceedingly difficult to do this when confronted constantly with a new and strange rule with no basis of law but established by a majority of one of the Supreme Court. UNLESS THAT COURT BECOMES WILLING TO ABIDE BY ITS OWN DECISIONS, AND RESPECT STATE LAWS, WE WILL SOON FIND STATE COURTS UNABLE TO LONGER FUNCTION. *****
>
> "We yield to no living men in our appreciation of and highest respect for the Supreme Court as a vital part of our Government and its proper supremacy over all courts, including this one. But if those occupying it will not uphold State procedure law that is constitutional and follow their own decisions sustaining those laws, chaos will reign in the lower courts of America." (Capitals added).

This petition and the record before this court in this case show beyond question that petitioners timely and properly raised substantial federal constitutional grounds in their verified petition in the Superior Court of Fulton County, Georgia and in their appeal to the Supreme Court of Georgia; that their petition was dismissed by said state trial court without a trial and without passing upon said federal grounds; and that their appeal to the

Supreme Court of Georgia was arbitrarily and capriciously dismissed by said court from the bench without a hearing or opportunity to be heard, all in violation of Section I of the Fourteenth Amendment of the U. S. Constitution providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. The record before the court in this case shows that petitioners have been deprived of all of said fundamental federal constitutional rights without due process of law and without equal protection of the laws in violation of Section I of the Fourteenth Amendment of the U. S. Constitution.

WHEREFORE, petitioners urge that they are entitled as a matter of absolute federal constitutional right under Section I of the Fourteenth Amendment of the U. S. Constitution to the grant of the writ of certiorari to the Supreme Court of Georgia and reversal of its arbitrary, capricious, and unconstitutional decision dismissing their appeal to that court without a hearing or opportunity to be heard and thereby depriving them of their liberty and property without due process of law and without equal protection of the law in violation of Section I of the Fourteenth Amendment of the U. S. Constitution in the particulars specified in their petition in the Superior Court of Fulton County, Georgia, their appeal to the Supreme Court of Georgia, and in this petition for certiorari.

Petitioners pray and urge that this Court issue an order requiring the Supreme Court of Georgia to restore

to its file in this case the affidavits which it arbitrarily and capriciously detached from petitioners' motion for rehearing and returned to their counsel, so said affidavits can be certified by the Clerk of that Court with the rest of the record material and essential to a proper consideration of this petition, for transmission to this Court, and that the writ of certiorari issue to that Court in accordance with the law.

Respectfully submitted,

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ACKNOWLEDGMENT OF SERVICE

Service is hereby acknowledged and copy received of the foregoing petition for certiorari and appendix thereto.

This the_____day of February, 1966.

Counsel for Defendants in
Certiorari